Supreme Court, U.S.
FILED
MAR 4 - 2004
OFFICE OF THE CLERK

No. 03-1121

IN THE

Supreme Court of the United States

TWIN LAKES DEVELOPMENT CORPORATION,

Petitioner,

-v-

THE TOWN OF MONROE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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THE REPORTER COMPANY, *Printers and Publishers, Inc.*
181 Delaware Street, Walton, NY 13856—800-252-7181
(1317 – 2004)
Printed on Recycled Paper

QUESTION PRESENTED

Whether the New York State Court of Appeals correctly held that Town of Monroe Local Law No. 3 of 2000, which sets the amount to be paid under New York State Town Law §277 in lieu of dedication of parkland in the Town of Monroe at $1,500 per lot for subdivisions of five or more lots, does not violate the "takings clause" of the Fifth Amendment of the United States Constitution?

STATEMENT PURSUANT TO RULE 29.6

Respondent, the Town of Monroe, is a municipal corporation and a political subdivision of the State of New York. It has no parent companies or non-wholly owned subsidiaries.

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JURISDICTION

The order of the New York State Court of Appeals affirming the Appellate Division's dismissal of the petitioner's complaint was entered on November 20, 2003. The petition for a writ of certiorari was filed on January 28, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

(1.) New York State Town Law §277:

New York State Town Law §277 (hereinafter "Town Law §277") provides that in granting approval for a residential subdivision of land a town planning board may require the land developer to include a park or parks within the development suitably located for playgrounds or other recreational activities, provided that the planning board shall first have made a factual determination that a "proper case" exists for requiring reservation of parkland. In determining whether a proper case exists, the planning board must, inter alia, evaluate the present and anticipated future needs for park and recreational facilities in the town based on projected population growth to which the particular subdivision will contribute. Bayswater Realty & Capital Corp., v. Planning Board of the Town of Lewisboro, 76 N.Y.2d 460, 560 N.E.2d 1300, 560 N.Y.S.2d 623 (1990). Further, the amount of land that the developer may be required to dedicate for use as parkland must be "roughly proportional" to the impacts of the proposed development on the town's ability to provide recreation and parkland facilities for residents of the town. Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309,

129 L.Ed.2d 304 (1994); see Long Clove, LLC v. Town of Woodbury, 303 A.D.2d 383, 755 N.Y.S.2d 666 (2d Dept. 2003).

Town Law §277 also provides that if the planning board determines that a proper case exists for requiring dedication of parkland and further determines that the property at issue is not suitably located for playgrounds or other recreational purposes, the planning board may require the land developer to pay a sum of money in lieu of dedication of parkland. Under Town Law §277, the amount of the payment to be made in lieu of dedication of parkland is to be established by the town board. Of course, the amount of the payment in lieu of dedication of parkland must be roughly proportional to the impacts of the proposed development on the town's ability to provide recreation and parkland facilities for residents of the town. See Long Clove, LLC v. Town of Woodbury, supra.

(2.) Town Of Monroe Local Law No. 3 Of 2000:

In 1983, (by Local Law No. 1 of 1983), the Town Board of the Town of Monroe set the amount to be paid by land developers in lieu of parkland under Town Law §277 at $750 per lot for residential subdivisions of more than five lots. That is, on residential subdivision applications of more than five lots where the Planning Board determined that a proper case exists for requiring dedication of parkland and further determined that the property at issue is not suitably located for playgrounds or other recreational purposes, the Town Board set the amount that the Planning Board was to require as payment in lieu of dedication of parkland at $750 per lot.

The amount of $750 per lot for residential subdivisions of five or more lots was an extremely low amount relative to the anticipated additional costs that a new single family home in a typical residential subdivision would impose on the Town in regard to maintenance, upkeep and provision of parks and

recreation facilities. However, for a variety of political and practical reasons, the Town Board decided to set the amount to be paid under Town Law §277 at the nominal figure of $750.

The Town Board codified Local Law No. 1 of 1983 as Town of Monroe Town Code §26B-2(A)(7). Every year the Town Board revisited the issue of the amounts to be charged under the Town's fee schedule (including amounts to be paid in lieu of dedication of parkland under Town Law §277) and considered revisions upwards or downwards. For some seventeen (17) years there was no increase in the amount charged in lieu of dedication of parkland in the Town of Monroe. During this time, the population of the Town increased tremendously and the amount of land available for parks and recreational uses was correspondingly drastically reduced.

In 1999, petitioner, Twin Lakes Development Corporation ("Twin Lakes"), applied to the Town of Monroe Planning Board for approval to subdivide a twenty-eight acre parcel of land into twenty-two residential lots.

In 2000, the Town Board of the Town of Monroe again undertook to review the amounts to be paid in lieu of dedication of parkland under Town Law §277. It concluded that the amount to be paid in lieu of parkland under Town Law §277 for subdivisions of more than five lots should be increased from $750 per lot to $1,500.00 per lot. This determination was made based upon the reasonably anticipated impacts per household that a typical residential subdivision would have upon on the Town's ability to provide recreation and parkland facilities for its residents.[1]

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[1] The petition herein asserts that the Town did not perform a formal recreational needs study prior to making this finding. There is no support in the Record for petitioner's assertion. In fact, a sworn affidavit was submitted stating, in pertinent part, that it had been determined that "[t]he anticipated

On or about June 5, 2000, the Town Board enacted Local Law No. 3 of 2000 which amended Town Code §26B-2(A)(7) by increasing the amount to paid in lieu of dedication of parkland under Town Law §277 for subdivisions of more than five lots to $1,500.00 per lot. Before Local Law No. 3 of 2000 was enacted, a public hearing was duly noticed and held at which anyone who wished to be heard could speak. Neither Twin Lakes, nor any other land developer, objected to the increase.

(3.) The Planning Board's Resolution Requiring Petitioner To Reimburse The Town For Consultants' Fees And Make A Payment In Lieu of Dedication of Parkland Under Town Law §277:

On November 14, 2000, the Planning Board adopted a resolution granting final subdivision approval to Twin Lakes. As a condition of subdivision approval, the Planning Board required that Twin Lakes reimburse the Town for the consultants, fees incurred in reviewing the subdivision application.[2]

The Planning Board's resolution also found that Twin Lakes' twenty-two lot residential subdivision presented a proper case for requiring reservation of parkland under Town Law §277 as a condition of subdivision approval. However, the Planning Board determined that Twin Lakes' property was not suitably located for playgrounds or other recreational purposes and that, therefore, Twin Lakes should be required to pay a sum of money in lieu of dedication of parkland as permitted by Town Law §277. The Planning Board's resolution provided that, as a

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facilities, of course, vastly exceed $1,500 per household."

[2] Town of Monroe Local Law No. 7 of 1991 authorizes the Planning Board to require applicants for subdivision approval to reimburse the Town for reasonable consultants' fees incurred in reviewing and approving subdivision plans.

condition of subdivision approval, Twin Lakes was required to pay the amount of $1,500 per lot (i.e., a total of $33,000) in lieu of dedication of parkland.

Twin Lakes did not contest the Planning Board's findings or the conditions attached to the grant of subdivision approval. It did not request an audit of the consultants' fees. It did not petition the Town Board for a reduction in the amounts charged in lieu of dedication of parkland. However, when Twin Lakes paid the amounts due for consultants' fees and in lieu of dedication of parkland it wrote "under protest" on its checks.

Twin Lakes accepted the subdivision approval granted by the Planning Board, obtained building permits and commenced construction work on the project. The subdivision has been completed and, upon information and belief, the property has been sold off.

(4.) Petitioner's Lawsuit For A Declaratory Judgment Annulling Local Law No. 7 Of 1991 And Local Law No. 3 Of 2000.

On February 1, 2001, Twin Lakes commenced the instant suit in New York State Supreme Court, Orange County, against the Town of Monroe seeking a declaratory judgment that Local Law No. 7 of 1991 and Local Law No. 3 of 2000 are illegal and unconstitutional.

Twin Lakes claimed that Local Law No. 7 of 1991 (i.e., consultants' fees) violated the Fifth Amendment of the United States Constitution (applicable to states under the 14th Amendment) as well as New York State's Constitution (Art. 1, §6 and §7) on the grounds that (1) it allegedly permitted a "dollar-for-dollar pass through" of all costs incurred by the Planning Board and (2) it did not contain a provision explicitly

authorizing an audit of the consultants' fees incurred by the Planning Board.

Twin Lakes also claimed that Local Law No. 3 of 2000 (i.e., payment in lieu of dedication of parkland under Town Law §277) violated the Fifth Amendment to the United States Constitution as well as New York State's Constitution (Art. 1, §6 and §7) on the grounds that (1) the local law did not set the amount required to be paid in lieu of dedication of parkland based an individual, precise, mathematical, calculation of the actual impacts generated by each subdivision as determined after an "individualized and individuated" hearing, and (2) the adoption of the local law allegedly violated Twin Lakes' right to procedural due process in that petitioner allegedly did not receive due notice of the local law before it was enacted.

(5.) The Record Made In The State Courts:

The Fifth Amendment claim asserted by Twin Lakes regarding Local Law No. 3 was that the local law is ***facially deficient*** (or "per se unconstitutional" as petitioner put it). Twin Lakes did not challenge the factual findings underlying the Town Board's determination that $1,500 per lot is the amount that should be charged in lieu of dedication of parkland under Town Law §277. Instead, Twin Lakes challenged only the ***procedure*** of setting the amount to be paid based on the reasonably anticipated costs and impacts of additional residential dwellings. That is, under Twin Lakes' legal theory, the amount that the Town Board set to be charged in lieu of dedication of parkland was irrelevant; it was the *general methodology* of fixing the amount - not the amount itself - that Twin Lakes claimed rendered the local law invalid.

The Town of Monroe brought a motion for summary judgment in which it debunked Twin Lakes' "takings" claim on legal grounds. However, contrary to the erroneous representations in the petition (at p. "6"), the Town also

submitted evidentiary proof in admissible form in support of its application to dismiss.

In regard to the Fifth Amendment claim, the Town's motion papers included evidentiary proof that in 2000 - just as in 1983 - the Town Board had determined (again, for a variety of political and practical reasons), to keep the amount to be paid in lieu of dedication of parkland at a nominal amount well below the actual per-household costs that the Town will incur for recreation and parkland.

Further, the Town pointed out that if an "individualized and individuated" hearing had been held on the impacts of Twin Lakes' particular subdivision there was no doubt that the amount that could be charged "in lieu of parkland" would have actually been much higher than $1,500 per lot. Moreover, it was undisputed that the cost to Twin Lakes if it were required to set aside even one of the buildable lots approved in its twenty-two (22) lot subdivision for recreational purposes or as parkland, would far exceed the total cost of the $1,500 per lot amount that it paid in lieu of dedication of parkland. The Town contended that Twin Lakes had clearly "come out ahead of the game" and that Twin Lakes had commenced this litigation in a cynical attempt to shirk its obligation to make the payment due in lieu of dedication of parkland.

In opposing the Town's motion and in cross-moving for summary judgment Twin Lakes principally argued the merits of its challenge to Local Law No. 7 of 1991. It opposed dismissal of its claim regarding Local Law No. 3 of 2000 only by: (1) arguing that Local Law No. 3 of 2000 violated procedural due process by setting the amount to be paid in lieu of dedication of parkland before the Planning Board had determined that a proper case existed for requiring dedication of parkland and (2) reiterating the contention that Local Law No. 3 of 2000 "per se violated" the takings clause of the Fifth Amendment because it

did not provide for a separate "individualized determination" of the amount to be charged to each subdivision applicant. *At no time, as the petition erroneously represents, did Twin Lakes ever contest the sufficiency of the evidence supporting the Town Board's findings in setting the amounts to be paid in lieu of dedication of parkland.*[3]

By decision and order dated December 12, 2001, the Supreme Court granted the motion by the Town for summary judgment dismissing Twin Lakes' suit. The lower court's decision was affirmed by the Appellate Division, Second Department by Order dated December 23, 2002. The New York State Court of Appeals affirmed the Appellate Division's determination by order dated November 20, 2003.

REASONS FOR DENYING WRIT

As is stated in Rule 10 of the Rules Of The Supreme Court Of the United States, review on a writ of certiorari is not a matter of right, but of judicial discretion, and certiorari will be granted only for compelling reasons. Our case does not present any compelling reason for review by this Court.

I. THERE IS NO CONFUSION REGARDING THE APPLICABLE LAW SUCH AS MIGHT WARRANT REVIEW OF THIS CASE.

The petition contends that certiorari should be granted because there is allegedly confusion regarding the rule of law applying to governmental exactions. The petitioner's contention is without merit. The applicable law is, in fact, well settled.

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[3] The assertion in the petition (at p. "6") that: "Twin Lakes relied squarely on Dolan's burden shift..." is simply not true.

In order for a governmental exaction (i.e., a mandated dedication of property) to pass constitutional muster there must be a "rational nexus" between the exaction and the governmental interest being advanced as well as "rough proportionality" between the amount of the exaction and the impacts of the proposed development. Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); Dolan v. City of Tigard, supra. There is no question that the general rule regarding governmental exactions applies to monetary payments made "in lieu of" dedication of an interest in real property. See Ehrlich v. City of Culiver City, 12 Cal.4th 854, 911 P.2d 429, 50 Cal.Rptr. 242 (1996). New York's courts, of course, recognize and follow the established rule of law. Bonnie Briar Syndicate, Inc., v. Town of Mamaroneck, 94 N.Y.2d 96, 721 N.E.2d 971, 699 N.Y.S.2d 721 (1999).

While determination of cases involving governmental exactions will often turn on the particular facts presented, the applicable law is certainly not a "bewildering national labyrinth" as petitioner suggests.

Moreover, it is undisputed that the established rule of law (i.e., Nollan/Dolan) applies to the governmental exaction at issue in our case. It is therefore difficult to see how our case presents an "important opportunity" for discussion and exposition of the applicable law as petitioner suggests.[4]

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[4] Judging from the Sister State decisions cited in the petition, it appears that petitioner is inviting the Court to speak on the standard of review for a Fifth Amendment challenge to "impact fee" or taxes. However, since our case does not involve an impact fees or a tax, it does not really present much of an opportunity for the Court to speak on that issue.

II. THE RECORD DOES NOT PRESENT THE ISSUE THAT THE PETITIONER PROPOSES TO SUBMIT FOR REVIEW.

The petition next suggests that certiorari should be granted because this case presents the Court with an opportunity to "clarify" and expound upon the issue of the burden of proof in a Fifth Amendment challenge to a governmental exaction and the quantum of proof that is necessary to successfully bring or withstand such a challenge. However, the record made in our case simply does not properly present the issue that the petitioner proposes to submit for review.

First, Twin Lakes' Fifth Amendment challenge to Local Law No. 3 of 2000 was actually only a very small part of petitioners' lawsuit. The complaint served by Twin Lakes concentrated principally on Local Law No. 7 of 1991 (regarding consultants' fees). The challenge to Local Law No. 3 of 2000 is mentioned only as an afterthought in the second cause of action of Twin Lakes' complaint. Of the 34 paragraphs in Twin Lakes' complaint, only three are devoted to Local Law No. 3 of 2000. Moreover, even such argument as petitioner devoted to its challenge to Local Law No 3. of 2000 was split between petitioner's procedural due process claim and its Fifth Amendment takings claim.

Second, and perhaps more important, the argument that Twin Lakes advanced in the state courts was a challenge only to the *facial validity* of Local Law No. 3 of 2000 (i.e., that the law was unconstitutional because it did not require the Town Board to make a mathematically precise, individual calculation of the actual recreational impacts generated by Twin Lakes' subdivision). Thus, Twin Lakes' Fifth Amendment claim stood or fell solely on the merits of a purely legal argument, and it had nothing whatsoever to do with the burden of proof or the quantum of proof needed to prevail in an exaction case.

Therefore, even if the issue that petitioner seeks to submit for review was worthy of this Court's attention (and respondent respectfully urges that it is not), our case simply does not present a proper vehicle for ruling upon it.

III. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Finally, the petition asserts that certiorari should be granted because the decision of the Court of Appeals is allegedly inconsistent with this Court's decision in Dolan v. City of Tigard, supra. That is to say, petitioner claims that the decision of the Court of Appeals was in error.

However, as was noted above, New York's courts recognize and follow the rule of law established by this Court's decisions in Nollan and Dolan. See Bonnie Briar Syndicate, Inc., v. Town of Mamaroneck, supra. Indeed, the decisions of the lower courts and the Court of Appeals in our case specifically recognized and relied on Dolan for their rulings. Thus, the error that petitioner seeks to assign to the state courts' decisions boils down to nothing more than the assertion that the state courts misapplied the applicable law to the particular facts of our case.

As is more fully set forth below, respondent disagrees with petitioner's assertion, and contends that the state courts' decisions were properly made. However, even if the state courts misapplied the law to the specific facts of our case (which, again, respondent vehemently denies), a petition for a writ of certiorari generally will not be granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. See *Rule 10 of the Rules Of The United States Supreme Court.*

Moreover, the Court of Appeals decision was correct. The complaint served by Twin Lakes in this action challenged only the *facial validity* of Local Law No. 3 of 2000. Twin Lakes did not question whether the amount of $1,500 per lot was "roughly proportional" to the impacts that its subdivision would have.

Twin Lakes claimed that, under the holding of Dolan v. City of Tigard, supra, the amount required to be paid in lieu of dedication of parkland could only be set after an "individualized and individuated" hearing resulting in mathematically precise findings of fact and financial analysis of the impacts of its subdivision. It argued that Local Law No. 3 of 2000 was "per se unconstitutional" because it fixed the amount to be paid in lieu of dedication of parkland based on the reasonably anticipated impacts per household that a *typical residential subdivision* of five lots or more would have upon on the Town's ability to provide recreation and parkland facilities for its residents.

As the Town pointed out in the motion to dismiss made in the state courts, Twin Lakes' argument is simply wrong on the law. The standard of review that Twin Lakes was advocating was the "specifically and uniquely attributable" standard that was discredited and rejected by this Court in Dolan v. City of Tigard, supra. The methodology used by the Town in our case was sufficient to satisfy the applicable "rough proportionality" standard.

Thus, on the Town's motion for summary judgment dismissing Twin Lakes' lawsuit, the Town demonstrated that there was no merit to Twin Lakes' challenge to the facial validity of Local Law No. 3 of 2000 as pled in the complaint. Under the common law of New York State, once a defendant moving for summary judgment has made a prima facie showing of entitlement to dismissal of the claim asserted against it, the burden of proof shifts to the plaintiff to come forward with evidentiary proof in admissible form demonstrating that the

claim has merit or, at least, that there are triable issues of fact on the claim. Friends of Animals, Inc., v. Associated Fur Manufacturers, Inc., 46 N.Y.2d 1065, 390 N.E.2d 298, 416 N.Y.S.2d 790 (1979). As noted above, in opposing the Town's motion Twin Lakes merely reiterated its contentions regarding the purported facial invalidity of Local Law No. 3 of 2000. The state courts found that the Town had established prima facie its entitlement to summary judgment and that the burden of proof had then shifted to the petitioner to make some showing of merit to its suit. In this procedural context (i.e., *after* the Town had demonstrated its entitlement to dismissal of the complaint), the state courts held that Twin Lakes had failed to carry its burden of proof on the motion for summary judgment.

The petition herein takes certain statements in the state courts' decisions regarding Twin Lakes' failure to carry its burden of proof (as set forth above) wholly out of context and attempts to portray them as sweeping pronouncements of law. Nothing could be further from the truth. In point of fact, the decision of the Court of Appeals in our case is completely consistent with this Court's decision in Dolan v. City of Tigard, supra.

IV. THE APPEAL HEREIN IS MOOT AND/OR THE PETITIONER LACKS STANDING TO PROSECUTE IT.

As additional grounds for denying certiorari, respondent respectfully asserts that the appeal herein is moot and/or the petitioner lacks standing to prosecute it.

Although the Town Board, by Local Law No. 3 of 2000, fixed the *amount* to be paid in lieu of dedication of parkland under Town Law §277, it was *the Planning Board's resolution* of November 14, 2000 that actually imposed upon Twin Lakes the *obligation* to pay $1,500 per lot in lieu of parkland as well as

consultants' fees as a condition of the Planning Board's grant of subdivision approval.

Instead of commencing a lawsuit challenging the Planning Board's resolution, Twin Lakes commenced the instant action seeking a declaratory judgment regarding the legality of Local Law No. 7 of 1991 and Local Law No. 3 of 2000. Twin Lakes' suit did not join the Planning Board as a party to this action and did not challenge the validity of the Planning Board's resolution.

The statute of limitations has expired for bringing any challenge to the Planning Board's resolution or the conditions imposed therein. See New York State Town Law §282 (McKinney 2003). Even if Twin Lakes were to succeed in obtaining a declaratory judgment annulling Local Law No. 7 of 1991 and Local Law No. 3 of 2000, the judgment would not have retroactive effect and would not annul, in whole or in part, the Planning Board's resolution or the conditions it imposed on the grant of subdivision approval. Accordingly, the conditions imposed by the Planning Board's resolution, including payment of $1,500 per lot in lieu of dedication of parkland, are now final and no longer subject to legal challenge. That is, *Twin Lakes cannot now recover the $33,000 it paid* to satisfy the conditions imposed by the Planning Board's resolution regardless of the outcome of this case.

Since the amounts paid by Twin Lakes in lieu of dedication of parkland and for consultants' fees cannot now be recovered regardless of the outcome of the instant suit, the action is moot and/or Twin Lakes lacks standing to pursue a challenge to the local laws at issue. Even if certiorari were granted and Twin Lakes prevailed on its appeal herein, the resulting *declaratory judgment would have no impact whatsoever on Twin Lakes' rights.*

Twin Lakes' suit has become, at best, nothing more than a Quixotic challenge to certain provisions of the Town Code with which Twin Lakes disagrees on philosophical or purely academic grounds.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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